

UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

Subcommittee on Technology and the Law

TESTIMONY

THE FREEDOM OF INFORMATION ACT

OCA 4172-88

Cy #2

8-2-88

1 STATEMENT OF A PANEL CONSISTING OF JOHN H. WRIGHT,
2 INFORMATION AND PRIVACY COORDINATOR, CENTRAL
3 INTELLIGENCE AGENCY; RUSSELL M. ROBERTS, DIRECTOR,
4 FREEDOM OF INFORMATION/PRIVACY ACTS DIVISION,
5 UNITED STATES DEPARTMENT OF HEALTH AND HUMAN
6 SERVICES; AND RICHARD C. FAULK, DEPUTY ASSISTANT
7 SECRETARY FOR OPERATIONS, DEPARTMENT OF STATE.

8 Mr. Wright. It is not really clear at this point. I
9 think that, well, first of all, in many of the FOIA requests
10 we get, many requestors allege that they have journalist
11 connections and we do require a fairly high degree of
12 specificity before we can make that determination.

13 And in the case of Mr. Peek, we do offer administrative
14 appeal rights in the event that the initial determination
15 either denies the fee waiver or the requestor is not satisfied
16 with the initial category determination.

17 At the time that request was serviced, we had relatively
18 little experience with the new provisions of the Reform Act,
19 and my advice to Mr. Peek at this point would be, if he did
20 not exercise his administrative appeal rights, to do so
21 because in the process of doing that, we do expand the
22 record. There is an exchange of information, and so forth.

23 The request for other fee considerations is looked at
24 more broadly in our organization, and that really is the
25 proper course of action at this point.

1 Senator Leahy. Well, let me tell you the statute is
2 fairly clear. It says, "Fees shall be limited to reasonable
3 standard charges for document duplication when records are
4 not sought for commercial use and the request is made by a
5 representative of the news media."

6 Now, a description of a newspaper which has county-wide
7 circulation in a county where there is a well-known college,
8 and one with which your agency has had a long and open
9 relationship, I might add, as has the Foreign Service and
10 others because of the language programs and all--members of
11 the agency give lectures and open-to-the-public forums at
12 Middlebury. Mr. Peek is an editor for that newspaper.

13 I mean, just based on what he has said here today, is
14 there any reason why he has to go through an appeal process?
15 I mean, isn't it pretty much on the face of it that he
16 qualifies as a representative of the news media, or are
17 editors precluded?

18 Mr. Wright. Well, I believe he identified himself in
19 the letterhead as Editor of the Addison Press, and it may not
20 have been entirely clear to our professional officers who
21 processed the case that he was indeed the editor of a
22 newspaper.

23 He did say in his request letter, and I have just had
24 the opportunity to look at it today, that newspaper articles
25 would be written based on the information disclosed. And the

1 only thing I can say at this point is that the initial
2 reaction to that request may have been to not see a connection
3 between him as editor as Addison Press and editor of the
4 newspaper.

5 [Laughter.]

6 Mr. Wright. Based on what has been said today, my guess
7 is that were he to supply us additional information, he might
8 well qualify for a fee waiver, or at least placement in the
9 news media category.

10 The issue of whether he would be entitled to a fee
11 waiver is--that would be considered on other merits.

12 Senator Leahy. Well, I don't think he is going to have
13 any difficulty proving the fact that he is a member of the
14 news media, and if you would like an affidavit from me, I
15 will be happy to do that. I have been both praised and
16 damned by his newspaper, usually with even-handed heavy-
17 handedness. So it is not for any other reason that I say
18 that.

19 But, you know, the thing that bothers me more than
20 anything else is in your letter, or your agency's letter that
21 was written by Mr. Strickland, it says this: "Although you
22 are an editor of the Addison Press, Inc., the information you
23 seek does not meet the regulatory requirement of current
24 events or information that would be of current interest to
25 the general public."

1 Now, that is kind of an outrageous statement, not to put
2 too fine a point on it, isn't it?

3 Mr. Wright. Well, I think you have to look at the
4 information requested, and essentially, as I recall, there
5 were three items in that request. One of those items clearly
6 involved a request for information on the possible conduct of
7 intelligence activities involving representatives from the
8 college.

9 Another of the items asked for information dealing with
10 relationships with individuals associated with Middlebury
11 College, and what we indicated there was that any records
12 which might reflect the existence of a covert relationship,
13 we would neither confirm nor deny the existence of any such
14 records.

15 Senator Leahy. But that is not the point. It says,
16 "would not be of current interest to the general public."
17 Now, any ongoing intelligence activity may be of current
18 interest, and none of us disagree that you have an exemption
19 for that and you neither confirm nor deny, and so on.

20 Mr. Wright. Yes.

21 Senator Leahy. I have no problem with that; I strongly
22 support that. But on his specific request, to say that it
23 could be of current interest to the general public--I mean,
24 isn't this exercising an editorial function that goes way
25 beyond anything that is set out in the law?

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1 Mr. Wright. Well, yes, I agree with that, but I would
2 like to, if I could, come back to the nature of the request.
3 In essence, the way that request was treated--and, again,
4 forgive me; I do not have the correspondence in front of me
5 and I am trying to recall this from memory.

6 Senator Leahy. Sure.

7 Mr. Wright. Essentially, a significant portion of that
8 request was denied, and we cited exemptions, named a denying
9 official, and gave Mr. Peek appeal rights. We focus,
10 however, down to what was left, and the remaining portion of
11 the request focused primarily, as I recall--again, I do not
12 have the letter in front of me--on CIA recruiting activities
13 at Middlebury College.

14 The CIA does recruit at colleges and universities
15 throughout the nation; it is a matter of public record. That
16 fact has been made known many times with regard to many
17 colleges and universities.

18 And, again, I come back to the point as to whether the
19 information on the fact that we are, again, recruiting on a
20 college campus in the U.S. would be of public interest or,
21 and I believe we may have stated in the response letter,
22 contribute significantly to an understanding of the operations
23 of the U.S. government.

24 And I think depending on which of those two criteria you
25 apply, you might very well come up with a different viewpoint

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1 as to whether a fee waiver should be granted.

2 Senator Leahy. Mr. Wright, I might say in that regard,
3 along with one of the administrators of the CIA I went to
4 Middlebury in a public forum. We discussed why it was very
5 appropriate for the CIA to be there. I did this at the
6 request of the Director of the CIA, who was at that time
7 hearing from a number of different schools not only in my
8 State, but in a lot of other States, about why the CIA
9 shouldn't be there recruiting.

10 I felt they had the absolute right to be there recruit-
11 ing, as well as any company would or anything else. But if
12 one agrees or disagrees with it, that is a choice for the
13 student to make.

14 Middlebury had invited in somebody who was strongly
15 opposed to the CIA who spoke one night, or a couple of people
16 did, and then one of the assistant directors of the CIA and
17 myself spoke of why they should be allowed to be there.
18 Again, they are public things.

19 The only reason I mention this is that it was an
20 overflow crowd each time. Trust me, there was a great deal
21 of public interest, and I suspect there would be today.

22 [The statement of Mr. Wright follows:]

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1 Senator Leahy. Mr. Roberts, how would you have handled
2 this request from Mr. Peek?

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1 STATEMENT OF RUSSELL M. ROBERTS

2 Mr. Roberts. Senator, I believe we would have simply
3 said--we would have looked at the letterhead. If we had any
4 questions, we would have called the gentleman, resolved any
5 concerns we had, and granted a fee waiver.

6 Senator Leahy. Is that what you sort of normally do if
7 you have a question? You just pick up the phone and call the
8 person, or do you go through a lot of correspondence back and
9 forth?

10 Mr. Roberts. We prefer to pick up the phone. We find
11 it cheaper and quicker, sir.

12 Senator Leahy. It probably gets a little faster, too.

13 Mr. Roberts. Oh, yes.

14 [The statement of Mr. Roberts follows:]

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- 1 Senator Leahy. Mr. Faulk, how about you, sir? What
- 2 would you have done in this case?

1 STATEMENT OF RICHARD C. FAULK

2 Mr. Faulk. Well, I am probably somewhere in the middle,
3 Mr. Chairman. We certainly would have tried to contact the
4 individual if we had questions, but unfortunately I think we
5 do most of our contacting by correspondence, which is slower.

6 [The statement of Mr. Faulk follows:]

1 Senator Leahy. I will be back in just a couple of
2 minutes. Again, we have another vote and I am going to go to
3 that and then I will be right back.

4 [Recess.]

5 Senator Leahy. Gentlemen, I want to thank you for your
6 forbearance on this, and I apologize for the votes we have
7 had to leave for.

8 Mr. Faulk, in your testimony you refer to the enormous
9 volume of requests that are received by the State Department.
10 Now, that totals about 5,000. The Food and Drug Administra-
11 tion--that is an agency with a total budget of about a tenth
12 of the Department of State--receives around 44,000 requests a
13 year and they seem to have a lot less trouble dealing with
14 them.

15 I know these are the kinds of questions you are eager to
16 have asked. How would you explain that?

17 Mr. Faulk. Well, I think, Senator, you have to look at
18 the complexity of the inquiries that we get at the State
19 Department. I think most of your colleagues up here and you
20 well know, foreign affairs is not a very direct business; it
21 is very complex, and so the inquiries we get are just as
22 complex as the business we are in.

23 As a result, they take an awful long time to review, to
24 go over the information, and get it back to the inquirer.

25 Senator Leahy. Well, yes, but your backlog is growing

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1 by several hundred cases every year. Do you see an ominous
2 trend? I mean, in all seriousness, FOIA can become a
3 dinosaur or it can be what it is supposed to be, a tool to
4 keep not only the American public informed, but those of us
5 in government doing what we are supposed to do and having to
6 acknowledge it if we don't. But yet it can die of its own
7 weight.

8 Mr. Faulk. I agree with you, Senator, and so does the
9 Secretary of State. Two years ago, he made it quite plain to
10 all of the assistant secretaries in the entire department
11 that he was one hundred percent behind FOIA and that we were
12 to find the resources and the people to do the job in a
13 timely fashion.

14 We have been trying to do that. We have increased the
15 FOIA staff; we have put a lot more time and effort in
16 automation in automating the process, and we have gotten our
17 backlog down. Unfortunately, it is not down to a number that
18 either you or I can live with right now, but we do believe
19 that we are moving in the right direction. Automation is
20 helping us tremendously in this field.

21 Unfortunately, some of the trends that we have been
22 seeing, though, are coming in with these massive increases of
23 compiled information. For instance, in my testimony I give
24 an example that we have one inquiry asking for all the
25 telegraphic traffic by our tags, which is our filing in-

1 dicators, for Managua and the department from the years 1978
2 to 1986.

3 That is over 10,000 telegrams that have to be retrieved,
4 reviewed, and worked on. That is, for us, an enormous
5 undertaking, and--.

6 Senator Leahy. How many of those telegrams would be
7 classified, just in your normal experience?

8 Mr. Faulk. Well, our records show that about 50 percent
9 of the inquiries coming in are classified, totally. In this
10 case, because of the tags that were requested, I would say
11 somewhere close to 80 or 90 percent are probably classified.

12 Senator Leahy. Now, that was '78 to--.

13 Mr. Faulk. '86.

14 Senator Leahy. '86. Now, that is--.

15 Mr. Faulk. A nine-year period, sir.

16 Senator Leahy. --a very important period. Samosa fell,
17 the Sandinistas came to power. From an historian's point of
18 view, if we are to have a true history of that period, this
19 is one of the best ways to get it, rather than speculate on
20 it, would it not be?

21 I mean, you know, we could argue both sides, but can't
22 they make that argument that if they use your designators,
23 that is the most objective way of getting the history?

24 Mr. Faulk. Well, it is the best way we can retrieve it,
25 also, so there are both sides to the coin. It is the all-

1 inclusiveness that bothers us. The Act itself says you
2 should have a specific inquiry on a specific subject, and
3 that is what we look for and that is not what is being given
4 to us in these all-comprehensive retrieval requests.

5 Senator Leahy. But on that one, can you sit down and
6 work it out with the requestor to break it into a manageable
7 size? I mean, I think that the thing--I am assuming that
8 your concern is the size of it, not the issue, or am I
9 correct?

10 Mr. Faulk. That is it exactly.

11 Senator Leahy. But yet you know that there is always
12 going to be a great deal of interest in this period in
13 Central America, both from those who have supported the
14 administration's positions down there and those who have
15 opposed it. So a lot of this stuff, you are going to have to
16 dig out at some time or another anyway. I mean, if it is not
17 this requestor, it is going to be somebody else. It is going
18 to be a news organization or it is going to be an historian,
19 or whatever.

20 Isn't it also to your advantage, though, to sit down and
21 break it into manageable parts and then go out, or is this
22 being over-simplistic?

23 Mr. Faulk. It is, but, again, as Mr. Markman pointed
24 out to you earlier, I think it is taking resources and
25 putting them into one requestor's request and working that

1 request through. What happens is other requests get back-
2 logged and, you know, we just can't compete.

3 So the individual who has got one request or has, you
4 know, a reasonable request falls further back in the queue.

5 Senator Leahy. Well, let me ask--.

6 Mr. Faulk. We believe there is some reasonableness in
7 the way to go about this, and that is what we are trying to
8 work out with the inquirers on this.

9 Senator Leahy. In preparing for this, I was struck by
10 something that I had seen in the question of procurement in
11 the Pentagon. The area of procurement is extremely important
12 to all of us not only to get our money's worth, but also to
13 make sure that the weapons systems that we buy actually do
14 work, and we know many of them do not.

15 But that is not a very good career move oftentimes for
16 somebody who wants to end up with stars on their shoulders if
17 they have been in the military, and certainly I think that is
18 a very valid desire. But they are not going to want to get
19 shunted off into procurement.

20 Now, Mr. Roberts, in your testimony you say the Depart-
21 ment of Defense and Health and Human Services have career
22 ladders for FOIA personnel. Am I correct in that?

23 Mr. Roberts. That is correct, Senator.

24 Senator Leahy. But, Mr. Faulk, that is not the case in
25 the Department of State. One does not make his mark as a

1 member of the Department of State by being involved in a
2 career in FOIA, is that correct?

3 Mr. Faulk. Well, we have no Foreign Service assigned
4 directly to FOIA. We do have them in our classification/de-
5 classification unit, which is--.

6 Senator Leahy. A Foreign Service officer would probably
7 shudder and lie awake nights if he or she thought they were
8 going to be assigned to FOIA. I mean, let us be very frank.
9 Is that correct?

10 Mr. Faulk. Absolutely, but we do have a cadre of very
11 experienced, very dedicated, loyal civil servants who do make
12 a career out of it and do a very good job, and they reach the
13 levels of GS-15.

14 Senator Leahy. So do you feel that there is enough of
15 an initiative to get good people to stay in there and to
16 improve, streamline, and make work the FOIA system?

17 Mr. Faulk. I have been attempting to do that, Senator,
18 since I have taken over the job that I currently have in
19 1986. The Department of State has gone to OPM and has been
20 able to get Schedule B authority to hire college graduates to
21 work as information techs, to work as paralegals in this
22 field. We hope to be bringing in our first tranche this
23 September and October.

24 We do have a problem in hiring. As you know, everybody
25 who works in the Department of State has to have a full field

1 background. It takes a long time to get that, and so we do
2 miss some of the hiring opportunities that other agencies
3 have.

4 Given the background and the information that people
5 deal with, they have to have a good clearance, and high-level
6 clearances take time. But we are working on trying to
7 improve the working area of our people, and also their grade
8 levels, and bring in more people.

9 Senator Leahy. Mr. Wright, what about over at the CIA?
10 Is this considered almost--well, in an open session I am not
11 going to mention a couple of the assignments that are
12 considered one step short of Alcatraz.

13 But going into the FOIA part of the CIA probably would
14 not be the most sought after area for a career CIA officer,
15 would it?

16 Mr. Wright. Senator Leahy, actually, some of the FOIA
17 positions are highly coveted. We do have a career track in
18 records management activities and an assignment in the FOIA
19 office would be considered an important tour of duty for an
20 individual on that career track.

21 As far as the review of records for releasability is
22 concerned, the CIA operates on the basis of using its most
23 senior intelligence officers to conduct those reviews. So
24 outside of the main workforce cadre, you do find a very
25 substantial number of intelligence officers, both operations

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1 officers and intelligence analysts, and what have you,
2 involved in the review of records to determine their ultimate
3 releasability.

4 Senator Leahy. So then if somebody gets well trained
5 into handling FOIA, they actually do have a career available
6 to them there. They would not be in a position where they
7 would almost immediately be looking for somewhere else to go?

8 Mr. Wright. Yes, sir, that is correct. It would be in,
9 overall, our records management field.

10 Senator Leahy. Now, Mr. Faulk, in regard to the fee
11 issues, I looked at the form letter that the department sends
12 to requestors to inquire as to their credentials and intent.
13 It seems like there is an awful lot of paperwork here.

14 Most of the initial request letters I have seen have a
15 lot of information, such as a university letterhead or a
16 listing of publications which would help people make waiver
17 determinations.

18 Are you able to categorize how much time is spent on fee
19 determination as compared to actual search and retrieval and
20 review of documents?

21 Mr. Faulk. If you don't mind, Senator, I will turn to
22 my expert on that and ask the question.

23 Senator Leahy. We will get the fee determination expert
24 here. Sir, you understand what I am--.

25 Mr. Faulk. I would like to introduce--.

1 Senator Leahy. How much time is spent on what we are
2 going to charge them and how much time is spent on what we
3 are going to give them?

4 Mr. Machak. Yes, Mr. Chairman. By the way, I am Frank
5 Machak, the department's information and privacy coordinator.

6 In all candidness, sir, much more since the 1986
7 amendments. The initial processing steps that we now follow
8 actually include the presence of an attorney periodically
9 during the week as we review the requests in order that we
10 can make the most reasonable judgment that we can.

11 I would say we are spending approximately one-and-a-half
12 persons a day just reviewing the incoming requests. That
13 would be a professional staff member, a paralegal, with the
14 help of an attorney, to clarify the issue of fees as well as
15 reasonable description.

16 Senator Leahy. One of the reasons I asked is that we
17 have a copy of a letter from the American Library Association
18 sent to Mr. Whitehead, and they took issue with the treatment
19 by the Department of State of the National Security Archive,
20 which is an ALA member, on the fee waiver issue.

21 The ALA says that the State Department's determination
22 that the Archive doesn't qualify for fee waivers and is a
23 commercial requestor, to boot, quote, "explicitly denigrates
24 the function of libraries in our democratic society."

25 I sort of think as a library as a place you go for

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1 public access. Why wouldn't libraries get waivers from fees
2 just sort of automatically?

3 Mr. Machak. Well, again, sir, just for the record, we
4 have made that decision with respect to the organization you
5 identified. I have not seen the letter, by the way, to
6 Deputy Secretary Whitehead.

7 But if I could make a general comment on libraries, we
8 are more concerned, again, with the private libraries. We
9 are concerned about this issue of what I will characterize as
10 passive dissemination; that is to say, just to collect
11 information and put it somewhere without some better defined
12 dissemination.

13 We are also concerned, Mr. Chairman, with those organi-
14 zations which we understand intend to resell government
15 documents. Finally, sir, of course, the group for which we
16 have made this decision, we have obviously indicated their
17 right to appeal to us and to provide us more information that
18 could perhaps persuade us in these areas.

19 Senator Leahy. Well, let us take the New York City
20 Public Library, for example. They get information on a
21 particular thing; they have a plan to--if people need it,
22 they are going to charge them for copying roughly equivalent
23 to their costs.

24 You don't consider that reselling, though?

25 Mr. Machak. No.

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1 Senator Leahy. Okay. Mr. Roberts, I noticed in your
2 annual FOIA report that you have collected more fees for
3 processing FOIA requests than any other agency. But I have
4 got a stack of complaints about this high of people complain-
5 ing about fees, but I don't think I have seen any from HHS.

6 You collect more and we don't get a heck of a lot of
7 complaints. Why is that? This gives you a chance to give a
8 self-serving answer.

9 Mr. Roberts. Thank you, Senator. I was hoping for just
10 such an opportunity.

11 [Laughter.]

12 Mr. Roberts. I think part of the answer is that our
13 FOIA officers and FOIA specialists are absolutely expert at
14 what they do. They are highly trained, they are very
15 competent.

16 Our procedures are intended to break down bureaucratic
17 barriers and get on with the issues raised by any Freedom of
18 Information Act request. First, we are going to classify
19 that requestor into either of the three categories on the
20 basis of the information we have in hand. If we don't think
21 that that is sufficient information, then we will get it as
22 expeditiously as possible.

23 We determine what we are going to do about fees and if
24 we are going to collect them, then we notify the requestor if
25 the fees would be in excess of \$250. Otherwise, we simply

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1 begin processing. If we are going to waive fees, that
2 decision is made immediately.

3 The second issue raised by any request is to what extent
4 are we going to comply. We don't consult with attorneys to
5 get to the answer, the resolution of either of those issues,
6 Senator. We don't consult with attorneys before making the
7 initial decision on what we are going to do, and we simply do
8 it.

9 If there is an appeal from that, then our rules require
10 that we consult with attorneys. We just don't feel the need.
11 Our attorneys have a very heavy workload. Initially, years
12 ago, we consulted them in every instance, and as we became
13 expert we simply decided we could relieve some of the burden
14 on them by biting the bullet and making our own decisions,
15 and we do that, sir.

16 Senator Leahy. But in defense of Mr. Wright and Mr.
17 Faulk, Mr. Wright represents an agency which by its very
18 nature deals heavily, in some instances exclusively, in
19 classified documents, not just the normal classification, but
20 straight up through code word documents. Mr. Faulk with the
21 State Department also has a great deal of classified material
22 going back and forth.

23 Can they look at an example from HHS and really apply
24 some of the steps that you have taken into CIA or State?

25 Mr. Roberts. I think any agency can expedite processing

1 of requests by use of the telephone, by hand-carrying, by use
2 of telefax machines, by other means.

3 Senator Leahy. Do you handle classified material?

4 Mr. Roberts. Yes, sir.

5 Senator Leahy. Of what nature?

6 Mr. Roberts. Referral, usually, from CIA, FBI, Defense
7 Department, State Department, National Security Agency, when
8 a request to them involves records that were generated by our
9 department.

10 Senator Leahy. Trade secrets?

11 Mr. Roberts. No, sir. Trade secrets--of course, we
12 have a very heavy volume of commercial use requestors.

13 Senator Leahy. But those are items that you have to
14 withhold under certain aspects of the law. I mean, there are
15 certain types of trade secret material that you do withhold,
16 do you not?

17 Mr. Roberts. That is correct.

18 Senator Leahy. I mean, you make that determination and
19 then withhold it?

20 Mr. Roberts. That is correct. Prior to the Executive
21 Order 12-600 on treatment of business data and response to
22 FOIA requests, we have for years done exactly that. Maybe
23 the practice enables us to do it quicker.

24 Senator Leahy. Well, Mr. Wright, Mr. Faulk, and Mr.
25 Roberts, I will just say to all of you as I have said to the

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1 Justice Department, you know, this Committee really does want
2 to work with you on FOIA issues, and we have. We have
3 written exemptions on classified material. We have worked on
4 organized crime issues and we have attempted other areas.

5 I don't mean to understate the difficulty when massive
6 requests come in or requests that touch on various aspects of
7 classified information, but I will just leave you with this
8 thought that it has been very, very much a case in FOIA that
9 we want the presumption on openness not on closed.

10 We know that reporters with deadlines don't have time to
11 appeal wrongful fee determinations for weeks on end. We also
12 know that for a lot of requestors, if agencies drag their
13 heels on requests or give a blacked-out piece of paper, then
14 the delay itself becomes a denial.

15 If access to government files is denied when there is
16 really no legitimate national security reason to do so, then
17 we become more of a closed government. We have enormous
18 advantages as an open government; we have certain disad-
19 vantages because of that.

20 With FOIA, mistakes will be made and periodically some
21 things will go out that probably shouldn't have, but I think
22 on balance we are far, far better being able to point to this
23 kind of openness.

24 It gets cumbersome. We lurch along sometimes as a
25 result of it, but I think we are better as a country. I

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1 think we are more public in our mistakes than other countries
2 are, but we usually benefit more from them.

3 I thank you gentlemen for being here. If it is any
4 consolation to you, if I had to have your job making some of
5 these determinations, I would probably have even less hair
6 than I do have. But I would also, though, suggest that all
7 of the agencies--and a lot of others could be here--they may
8 want to drop by HHS and just see what determination is made
9 to make it work well, the telephone calls, the telefax
10 machines, and all. Sometimes it can help things along.

11 Thank you.

12 [Whereupon, at 1:03 p.m., the Subcommittee was adjourned.]